

IN FACTFINDING PROCEEDINGS UNDER  
CALIFORNIA GOVERNMENT CODE SECTION 3505.4 (a)

In the Matter of a Dispute	)	
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	)	
between	)	
	)	
	)	
	)	<b>REPORT AND</b>
	)	<b>RECOMMENDATIONS OF</b>
	)	<b>FACTFINDING PANEL</b>
CITY OF LIVINGSTON	)	PERB SA-IM-134 and 135-M
	)	
	)	
and	)	
	)	
OPERATING ENGINEERS, LOCAL 3	)	
	)	

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Factfinding Panel

CHRISTOPHER D. BURDICK, Esq., Impartial Chair  
DANNA RASMUSSEN, SR. ADMINISTRATIVE ANALYST, City-Appointed Factfinder  
JASMINE BAIN, Senior Accountant, City-Appointed Factfinder  
SERGEANT RAY FONG, Union-Appointed Factfinder  
ANIMAL CONTROL OFFICER KRISTEN LUCAS, Union-Appointed Factfinder

December 10, 2013

Appearances

For the City:	Jesse Lad, Esq., Myers, Nave LLP, PO Box 3420, Oakland, CA 95927
For the Union:	Darren Semore and Mike Eggener, Business Representatives Operating Engineers, Local 3 538 McHenry Ave., Ste. "B", Modesto, CA, 95354

## INTRODUCTION

This fact-finding arises out of an impasse in negotiations between Operating Engineers, Local 3 ("Local 3" or "Union") and the City of Livingston ("City") dealing with the Union's two Police Department bargaining units, consisting of 19 budgeted positions in the City's Police Department ("PD"). After a lengthy course of bargaining to reach agreement on a Memorandum of Understanding ("MOU": Cal. Gov. Code section 3505.1) between the parties for Fiscal Year 2013-2014 ("FY 13-14"), they reached impasse in January of 2014, waived mediation, and, pursuant to the Union's demand, submitted the dispute to this fact-finding, held in the City on December 10, 2013.

Christopher D. Burdick was appointed by the Public Employee Relations Board ("PERB") to serve as Impartial Chair of both Factfinding Panels. The parties agreed to consolidate both hearings for all purposes, including this Report (as the issues were the same for both) and so hearing was held on Monday, December 10, 2013 at City Hall in Livingston. The City was represented on the Panel by Jasmin Bains, Senior Accountant for the Police Unit and Danna Rasmussen, Senior Administrative Analyst/Risk Management, for the Police Supervisors Unit, while the Union appointed Sgt. Ray Fong of the LPD as the representative for its Police Supervisory Unit and Animal Control Officer as the representative for the Police Officers' Unit. Jesse Lad, Esq., of Myers, Nave LLP appeared for the City, and Darren Semore and Mike Eggener, Business Representatives, appeared for the Union.

The time limits and deadlines set forth in Cal. Govt. Code Sections 3504 and 3505 were waived by the parties, the Panel and the Chair. The parties were afforded full opportunity to make opening statements and, in lieu of presenting witnesses in a formal, adversarial setting, to make their showings and arguments on each of the three issues in dispute.

At the conclusion of the hearing, the Panel met in executive session for several hours and discussed the issues and procedural matters dealing with the drafting of this Report. On January 20, 2014, the Chair sent by E-mail his first draft Report to his co-panelists, and, over the next 10 days, received their responses and proposed revisions, modifications, deletions, and redrafts. Those comments were received from January-28, and given a continued impasse on the issues

described below, on the date set forth below the Chair issued his final Report, with the concurrences and dissents of his co-panelists, as noted in the body of the Report.

## I

### CITY AND UNIT DESCRIPTION

The City, founded in the early 20<sup>th</sup> Century, is a small, struggling general law city, operating under the council-manager form of government. The City, located in Merced County, in California's economically challenged Central Valley, takes up barely 3.5 square miles and has a population of approximately 13,000. Local 3 is the recognized employee organization for approximately twenty (20) of the City's PD employees in these two units (to wit, three Sergeants; two Corporals; nine Police Officers; five full-time ("FT") and one part-time ("PT") Dispatchers; and one Animal Control officer. The PD also dispatches for the Gustine PD. The City has no fire department (the County provides such service), although there is one fire station close to City Hall.

The City employs approximately 47 full-time and 7 part-time employees and has two other bargaining units, both of which have reached agreements with the City for FY '13-'14, as described below.

## II

### ISSUES

At Factfinding, only one broad issue, the City's cost-savings proposal, remained unresolved and were submitted at the December 10 hearing to this tripartite Factfinding Panel for hearing and recommendation, as follows:

- 1) A five-percent (5%) pay cut effective July 1, 2013, for FY 2103-14;
- 2) Employee payment of \$50.00 per month towards health care premiums, for FY 2103-14;

- 3) A cap of forty (40) hours on the amount of vacation leave employees can "sell back" to the City, a reduction from the established eighty (80) hour cap, for FY 2013-14.

4) .

After a series of proposals for actual improvements in wages and benefits, the Union ultimately proposed simply to maintain the 2012-'13 *status quo ante* for FY '13-'14.

### III

#### STATUTORY CRITERIA

The Meyers-Miliias-Brown Act ("MMBA"; Cal. Gov. Code sections 3500 *et seq.*; eff. January 1, 1969) was amended in 2011 to add a new step to the impasse resolution procedure, namely Section 3505.4 (a), which allows the recognized employee organization (but not the employer) to insist upon mandatory fact-finding after the unsuccessful conclusion of mediation.<sup>1</sup>

Section 3504.4 (a).

If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the

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<sup>1</sup> This amendment is less than a masterpiece of legal drafting and leaves ambiguous the status of mediation, which prior to this amendment was entirely permissive and available only at the parties' mutual, arm's-length agreement to submit their dispute to mediation. Under the new amendment, if mediation (which still appears to be permissive and not mandatory) is resorted to, and proves unsuccessful, then the recognized employee organization (but not the city, county, or district, as the case may be) can insist upon fact finding.

power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

- (1) State and federal laws that are applicable to the employer.
- (2) Local rules, regulations, or ordinances.
- (3) Stipulations of the parties.
- (4) The interests and welfare of the public and the financial ability of the public agency.
- (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the fact finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
- (6) The consumer price index for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

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#### Section 3505.5 (a).

If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

#### IV

#### **DOCUMENTS AND MATERIALS**

The City provided the Panel with a binder of documents, including the printout of a PowerPoint presentation; the Declaration of the Assistant City Manager/Finance Director, Mr. Ortiz; a number of City budget documents and projections; as well as documents and financial printouts requested by the Union on such matters as the City's expenditure on the Sweet Potato Festival and the raffle of a Toyota Camry. The City also presented a letter brief from its counsel, and the Union did the same with a Memorandum from its chief negotiator, as well as the current Memorandum of Understanding ("MOU"; Cal. Gov. Code Section 3505.1). The Panel also received the evolving proposals of the Union and the City on a number of issues, including those here in dispute.

#### V

#### **POSITION AND ARGUMENTS OF THE PARTIES**

The positions of the parties, and their arguments and rationales on the disputed issues, are as follows:

**City** – the City argues that its financial status is dire; that its revenue has declined drastically in the last decade and its operating expenses have risen slightly and for FY 2012–2013 it had an operating deficit of about \$116,000; that local sales tax revenues are volatile and

are expected to decrease in FY '13-'14; that the City's fund budget expenditures for FY 2013-14 are \$4,600,000, a sum which exceeds projected revenues by over \$150,000; that as a general matter, general fund expenditures between FY '04-'05 and FY '12-'13 have greatly exceeded revenues and the total operating deficit between those fiscal years now totals over \$2.5 million; that the City's general fund reserves have declined dramatically since 2005, when the City had \$3,446,340 in general fund reserves, declining, as of June 30, 2012, to \$1,471,480, a sum which declined even more, so that, as of June 30, 2013, due to impacts associated with the dissolution of the Redevelopment Agency and an operating deficit in the amount of \$116,000, it stood at a woeful \$843,905; that the LPD's personnel costs for FY '13-'14 will be \$2,244,750, or approximately 76% of the City's overall general fund expenditures for personnel costs; that the City's CalPERS employer contribution rate has increased over the last four fiscal years and is projected to increase in coming years; that the City has substantial unfunded liabilities, the most challenging of which is its retiree health care obligations, presently funded on a "pay-as-you-go" basis, which cost the City \$110,000 for just 11 retirees in FY 2013-2014, with a future actuarial liability which may well exceed \$3,800,000; that the City has not funded for employee leave accruals for cash outs and estimates its general fund vested legal benefit liability at approximately \$217,000; that like many other cities with a redevelopment agency (RDA) which was shut down by the Legislature and Gov. Brown recently, it has outstanding loans and guarantees and has had to write off its books, as an asset, almost \$511,000 in outstanding loan principal, plus related loan payments, any amount of \$700,000 which were made in 2011, all from loans made to its RDA, which the State Controller has declared to be unenforceable; that the City has reached agreement with its other two bargaining units for unpaid furloughs for FY 2013-2014, in both the Public Works Unit and the Management and Confidential unit, furloughs equal to a 5% wage cut, and that these two Police units should suffer the same pain; and so the City's LBFO of a 5% wage reduction, coupled with the \$50 medical premium and a freeze on vacation cash outs should be the recommendation of this Panel.

**Union** – The Union concedes that it has no dispute or argument with the City over its data, numbers, and financial projections and agrees the City's present financial state is perilous; but the Union accurately observes that its members have gone since 2008 with no true across-the-board pay increases but have only received *de minimis* one-time bonuses; that Livingston's police officers are some of the lowest, if not the lowest, paid in Merced County and the

surrounding market-comparable counties; that the “2% at Age 55” CalPERS formula applicable to Livingston's police officers, to which the Union has no objection, has not been market-comparable for over 10 years; the cost of living CPI has gone up approximately 1.5%-2% each year since 2008 while its members have received essentially nothing in the way of across-the-board salary increases; and, so, in real terms and adjusting for inflation, its members are far worse off today than they were in 2008; that turnover and training new police officers is the most expensive cost a police department can incur, and with the present low wage and benefit structure, Livingston experiences these costs not infrequently; but that to meet the City's desires, and to join with other City employees in sharing the pain, the Union and its members are willing to agree to some kind of furlough plan, equivalent to a 5% salary decrease, subject only to the unique scheduling needs of a 365/24/7 operation like the LPD; so the Panel should recommend either the *status quo ante* or some form of a furlough approach and not the drastic cuts proposed by the City.

## V

### **THE CITY'S FINANCIAL STATE AND ITS “ABILITY TO PAY”**

This dispute deals with the City's proposal to substantially reduce the take-home compensation of its employees in these units, by imposing a 5% across-the-board salary cut to every employee in the two bargaining units, as well as asking the employees to pay (apparently for the first time in recent memory) \$50 per month towards their health care insurance premiums, as well as putting a new 40 hour cap on the amount of accrued vacation leave that employees can “sell back” to the City during fiscal year 2013-14, and optional longer available, some practical matter, this time, since the unit members of already cashed out their entire red eligible balances in early December.<sup>2</sup> The Union proposal is simply to maintain the *status quo ante* and to “rollover” the 2012-2013 MOU to FY 2013-2014. The City demands of the Union are based on its claimed financial distress, and so we must review the City's financial state as of the date of the hearing, as, under Sec. 3505.4(d) (4), the Panel is required to consider “the interests and welfare of the public and the financial ability of the public agency.”

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<sup>2</sup> The Union does not hotly argue against the vacation cap and health premium proposals — its major concern is the 5% across-the-board salary reduction, for all ranks and classes in its two units.



In FY '12-'13, Livingston had an operating deficit of about \$116,000. The City's general fund budget expenditures for FY '13-'14 are budgeted at \$4,600,000, exceeding projected revenues by over \$150,000; indeed, as a general matter, General Fund expenditures between FY 2004-2005 and FY 2012-2013 have exceeded projected revenues and the total operating deficit between those fiscal years now totals over \$2.5 million. Not surprisingly, the City's general fund reserves have declined dramatically since 2005, when the City had \$3,446,340 in general fund reserves. As of June 30, 2012 the reserves stood at \$1,471,480, declining even more, so that, as of June 30, 2013, it stood at a woeful \$843,905. The LPD's personnel costs for FY 2013-14 will be \$2,244,750 or approximately 76% of the City's overall general fund expenditures for personnel. The City's CalPERS employer contribution rate has increased over the last four fiscal years and is projected to increase in coming years and the City has substantial unfunded liabilities, including its retiree health care obligations, presently funded on a "pay-as-you-go" basis. These cost \$110,000 for just 11 retirees in FY 2013-2014, with a future actuarial liability which may well exceed \$3,800,000. In addition, the City has not funded employee leave accruals which workers can annually cash out and it estimates its general fund vested legal benefit liability for these at approximately \$217,000. Like many other cities with a redevelopment agency (RDA) shut down by the Legislature at the urging of Governor Brown recently, Livingston has outstanding RDA loans and guarantees and has had to write off of its books, as an asset, almost \$511,000 in outstanding loan principal, plus related loan payments made in 2011, in loans it made to its RDA, which the State Controller has declared to be unenforceable. Against this depressing backdrop, the City reached agreement with its other two bargaining units for unpaid furloughs for FY 2013-2014, in both the Public Works and the Management and Confidential units, furloughs equivalent of a 5% wage cut.

## VI

### **THE PARTIES' LAST, BEST AND FINAL OFFERS**

In the weeks following the yet hearing on December 10 and the Chair's circulation of his first rough draft of this Report, the parties modified their positions and exchanged numerous proposals, counterproposals, and counter-counter-proposals to each other. As of January 29, 2014, the parties' proposals were as follows:

### City

- A) One Year Contract: July 1, 2013 through June 30, 2014
- B) A retroactive 5% temporary pay cut to LPOA members effective 07/1/13 through June 30, 2014 ; and,
- C) A retroactive \$50.00 monthly employee contribution towards medical insurance premiums effective 07/1/13 through June 30 ,2014; and,
- D) Employees who opt out of group medical plans sponsored by the City, and who provide proof of medical coverage in another group plan, will receive \$400 per month, in a deferred compensation plan of the employee's choice or as actual cash compensation.. This benefit will become effective upon final ratification by both parties, but any Federal/State laws/policies/guidelines which conflict with this program will supersede this section and this incentive may thus be subject to termination.

### Union

A one-year contract for FY 2013-2014, with a 6% cut in salary attached to rank/step held, sun-setting out on June 30, 2014, with the City to suspend all in-service training for the rest of FY 13-14.<sup>3</sup>

It may be seen that the City has not deviated, from the hearing until today, on its insistence upon a retroactive 5% reduction in pay, while the Union, ultimately agreeing to the concept of a wage cut in lieu of furloughs, has consistently rejected the concept of retroactivity.

## **VII**

### **THE CHAIR'S STATUTORY DISCUSSION AND ANALYSIS**

That the City's present financial status is, indeed, truly horrendous is not disputed by the Union. Livingston has had nine years of steadily declining reserve levels, slightly increased

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<sup>3</sup> The union's last proposal, impliedly withdrawn, to approach the matter on a furlough basis consisted of the creation for each employee of a 96 hour "furlough bank", and employees would be required to use those 96 hours, without pay, before August 1, 2014; if the employees still had hours left in the bank, those hours would be forfeited without pay.

personnel costs, and declining revenue. Other than the headquarters of Foster Farms (recently "red-tagged" by the State for sanitary issues), there are no large businesses in town and the City's sales and property tax receipts come primarily from agriculture and a few gas stations, chain restaurants and coffee shops along the Highway 99 corridor (Highway 99 bisects the town, as it travels from north to south). The City's highest personnel costs are directly related to the salaries and benefits of its police lieutenants, sergeants, corporals, officers, dispatchers, and animal control officer. The City lies in the heart of California's Great Central Valley, an area which, for the last decade, has been chronically impoverished and subject to extraordinarily high rates of unemployment (and the health problems which go with both), as well as well-publicized mortgage foreclosures and material reduced property values during the housing market meltdown through Proposition 8 procedures. All of these problems put great pressures on local municipalities, which also find themselves simultaneously cash-strapped because of drops in sales and property values. It could take years for these housing values to return to their previous levels, much less go higher.

It also appears that the City's police employees are among the most poorly compensated public safety employees in Merced County and the surrounding area -- their wages are well below market and their "2% at Age 55" retirement formula is so out of date that CalPERS doesn't even offer it anymore.<sup>4</sup> The police officer classes have not seen a true across-the-board salary increase since 2008. About the only relief for the officers in this dreary landscape is the fact that the City still maintains (and is not proposing to change) the seven-percent (7%) so-called Employer Paid Member Contribution (EPMC), under which the City "picks up" and pays on the employee's behalf the 7% the employee would normally pay CalPERS for his/her normal employee contribution. The City observes that many of these employees are at the top step of their salary ranges and receive some not insubstantial fringe benefits, including the EPMC described above, as well as fully paid health care to which the employees presently make no premium contribution. Under MOU Sec 18.1 employees may "sell back" to the City a maximum of 80 hours of accrued vacation leave every year, on June 1 (40 hours) and again on December 1 (either 40 or 80 hours). The employees have this right now matter how little vacation they actually have on the books (obviously they cannot sell back vacation leave they have not earned).

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<sup>4</sup> We do not know, from the record, if the other "miscellaneous" City employees are similarly situated *vis-à-vis* the relevant labor market for their jobs/occupations, but we suspect they are.

There is a 240 hour cap on the accrual of vacation leave, with hours earned and accrued above that ceiling automatically paid out to the employee in the next bi-weekly pay period. As a practical matter, every employee who can do so does this, to supplement their below-market pay, and for FY 2013-'14, this has already happened and is a *fait accompli*.

Under normal circumstances, asking such poorly paid (by market standards) employees to take a hit in their take-home compensation would be a real stretch. But these are not normal circumstances.

Generally speaking, and in less woeful budgetary times than we are presently experiencing, collective bargaining in the public sector is primarily driven by three factors: 1) external comparability (that is, what other public employers are paying their employees similarly situated, what attractive CalPERS or 1937 Act pension options have been contracted for, etc., etc., usually on a total compensation basis); 2) internal comparability and equity (that is, what this particular public employer is providing to its other employees during the relevant round of bargaining); and 3) any increases in the CPI. In the last three or four years, as public entities have been battered by the economy, "ability to pay" and the "welfare and interest of the public" (including un- and underfunded pension and retiree health care obligations) have become increasingly more relevant criteria. Often disputes between public employers and their workers simply center on the setting of priorities, with claims by the workers that if the City had its house in order and set its priorities straight, and spent its funds on them rather than on other, less pressing matters, their labor relations problems would be ameliorated. Unfortunately, it appears here that this is not a matter of setting priorities all but a simple lack of any funds.

The Legislature here has directed fact-finding panels to look to the usual compelling labor and employment "facts of life" which drive all employers and employees to make decisions on how to run their lives and operations. Employers look first to their budgets and projected revenues and then compare themselves with their competitors for labor, namely those other employers (public or private) of approximately the same wealth and size, offering the same kinds of services, who wish to hire (and then retain) from the same pool of applicants. Employees, on the other hand, invariably look to their own self-interest, hoping to convince their employers that the competitive labor market is paying a higher price than what is being paid to them, while also reacting (like every other covetous human being) to what their co-workers are being paid by the same employer, regardless of the nature of their work. We also look to internal comparisons and

internal equity — — what the other City employees are paid by the same public employer is often the single biggest source of irritation (or contentment) for individual employees. The California Supreme Court has recognized that a public employer's philosophical belief in, and its bargaining table insistence upon, a consistency in the application of its fringe benefits and related compensation is not, standing alone, a *per se* violation of its duty to "bargain good faith": Banning Teachers Association, CTA/NEA vs. PERB (1988) 44 Cal 3rd 799.

## VII

### APPLICATION OF STATUTORY CRITERIA TO THE FACTS AND ISSUES

A. The City's Undisputed Financial Woes The Union does not dispute the City's data, figures, and projections and agrees that the reserves have dropped to historic lows. But, the Union argues and contends, the City has itself, and its staff, to blame for much of its troubles and that the police officers represented by the Union should not be unduly burdened by the errors and mistakes of others. In particular, the Union points to two possible examples of wasteful spending which, it contends, may just be the tip of the municipal iceberg, and part, or the source, of the fiscal problems and the fruits of poor judgment and bad planning.

B. The Union's Examples of "Wasteful Spending" The first is the so-called Sweet Potato Fair<sup>5</sup>, an annual event to which the City contributes not only some funding but heightened police protection and the overtime which results there from: the actual operating deficit for the Fair in the year in question was \$1,400. The Union contends that the City's financial and personnel commitments to the Fair cost money, dollars which should have been saved so that furloughs or salary reductions might have been avoided. The facts do not support this assertion.

The second was the City's alleged purchase of a Toyota Camry for a raffle in 2013, a raffle which may not have been a financial success. This raffle was associated with a Fourth of July celebration, in fact not hosted by the City, and the ultimate raffled Toyota was paid out of non-City funds. The Fourth of July event is an annual event, not hosted by the City, and a non-

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<sup>5</sup> Apparently Livingston and the immediately surrounding area is the source of 80% of California's sweet potato crop.

profit committee plans, runs, and funds this annual event and the City had no ultimate out-of-pocket expenditures for the purchase of the Camry in question.

The Chair assumes *arguendo* that both of these decisions were, in retrospect, perhaps inopportune<sup>6</sup>, but we fail to see how that conclusion helps us out at all. California is littered with examples of bad municipal decisions involving the expenditure of public funds on undertakings which have proved to be unsuccessful, *e.g.*, the City of Fresno's failed tortilla factory, the Raiders and the Oakland Coliseum, the One-Million Dollar severance given to BART's former General Manager, the City and County of San Francisco's overspending on the recent America Cup races, etc., etc.

C.     The Finances As We Find Them     The Panel has to take the City's finances as we find them, and even if we were faced with an example of outright fraud or embezzlement (not unheard of in the public sector, *e.g.*, Bell, although fortunately rare), such an unfortunate background would not help us one little bit in conjuring up more money or helping to project higher revenues for the coming fiscal year. As the kids say, "it is what it is", and the "is" when it comes to the City's finances here is terribly depressing. The City's other two units have agreed to furloughs amounting to a 5% net reduction in their members' take-home pay. But in the Police Department, a 365/24/7 operation (and one in which the dispatchers dispatch not only for the Livingston PD but for the Gustine Police Department as well) furloughs present a very difficult scheduling problem: sending a police officer home for one work day a week, without pay, saves nothing if the Police Department is minimally staffed and that vacancy now has to be filled on an overtime basis. As it is now, about 40%% of the City's present LPD costs for OT flow from filling vacancies to maintain minimum staffing. In fact, furloughs will cost money, not save it.

D.     The Proposed Vacation Sell Back Cap     The City proposed to put a 40-hour cap on vacation sell backs, a proposal which is now, essentially, moot, as the sell back has already occurred for this fiscal year. Frankly, the Chair would prefer to get rid of these sell backs in their entirety, and to raise the limit on accruals, so that the employees could accrue, let us say, vacation to two or three times their annual accrual rates, with time accrued in excess of those limits lost and having no cash value. Vacation accruals should result simply real time-off and not become a

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<sup>6</sup> This might be true of the raffle but we fail to see how the City support of the annual Sweet Potato Festival was misguided -- the City certainly has a *bona fide*, reasonable interest in attracting visitors to the City and its merchants, stores and retailers in the hopes of increased sales, visits, and in increasing the viability of local businesses, all in the hopes of increased sales tax revenues.

*de facto* bank of last resort to make ends meet, and the City has not really funded this benefit, at least in the past, so that the cash outs are a bi-annual hit to the General Fund.

But all the City asks, in the short-term, is a cap, and we shall recommend one.

E.     Employee Contributions To Health Care Premiums     The City has proposed (although the proposal seems to wax off-and-on, occasionally) that the employees, who presently pay nothing for their personal and family health care, begin to pay \$50 per month for those premiums. Obviously, this \$50.00 is going to come out of their paychecks and will constitute yet another hit to the employees' take-home bottom line. This will be painful, but the Chair believes it is necessary, both to help the City achieve its cost-saving goals and for other sound public policies, not the least of which is the avoidance of what economists call "moral hazard". Moral hazard occurs when individuals are not taxed with the economic-consequences of their decisions – in this case, those who pay nothing for health care – and so make choices that they might otherwise not make if they paid some of the costs of those decisions. So, in the case of health care, those who pay nothing for premiums and only minimal deductibles and co-pays (about which here we have no information) tend to elect the most costly procedures, services and products because there are no disincentives to force them to actually make prudent economic decisions. We believe that these workers (as heavily burdened as they are) should start making increasingly higher contributions to their premiums, starting with \$50.00 now and increasing to \$100.0 on July 1, 2014.

F.     Retroactive Pay Cuts     The City's position, on which it has remained fundamentally unchanged, is that any pay cut must be imposed retroactively to July 1, 2013. Apparently until quite recently the City has not given much, if any, thought as to whether that pay cut will also impact overtime paid since July 1, 2013 and the other cash payments which are driven by the hourly rate employees receive (e.g., holiday pay, shift differentials, sick leave cash outs, incentives, and the like). It is one thing to ask employees to disgorge, on some prospective basis, 5% of the sums paid to them in the previous seven or eight months – – is another thing entirely for the City to calculate and then recoup overtime, holiday pay, sick leave cash outs, and the like, all of which were calculated upon the "old" rates of pay. Will the City attempt to recoup

these sums from persons who are no longer City employees and, so, how? On February 3, 2014 the City disclaimed any intent to do most of this.

Nor does the City appear to have given any deep thought as to how it is going to report this recalculation to CalPERS and how it will affect people who have left City service since July 1, 2013. Will it ask CalPERS to lower the pensions of those employees who have retired in the last seven or eight months? How will it report this recalculation of "compensation earnable" to CalPERS for the purpose of normal employee contributions, normal employer contributions, and the EPMC?

All of these uncertainties and difficulties convince the Chair that reaching backwards is not only exceedingly difficult (and time-consuming to calculate and report for City financial staff), but is fundamentally unfair and unpredictable: we prefer to reach forward, for larger sums, and to do on a prospective basis only that which has not been done in the past.

G. Term Given the discussion about retroactivity coupled with the City's need to cut its costs for these units, the Chair believes that an MOU with a term to the middle of FY '14-'15 would be prudent: it allows the City to capture some (but not all) of the cost savings it seeks while taking the parties part of the way into the FY so they can see what the budget looks like in what may, perhaps, be a better year.

## VIII

### RECOMMENDATIONS

Based upon the general factual background set forth above, the Chair believes that an MOU of 18 (18) months, running from July 1, 2013 through December 31, 2014 is most appropriate, and then across-the-board, one-time base salary decrease of 7% (7%) should be accepted, effective March 1, 2014 and ending ("sunsetting") on December 31, 2014; that the employees should commence to pay, soon as legally possible, \$50 per month towards their healthcare; and that the City's proposed 40 hour cap on annual vacation cash outs/sell backs should also be a part of the new MOU. Thus our recommendation for a new MOU includes the following terms and conditions:



- A) Term – July 1, 2013-December 31, 2014; and,
- B) Wages – a seven percent (7%) cut in base salary effective march 1, 2014 and ending December 31, 2014, on which date the salaries shall revert to the rate effective on February 28, 2014; and,
- C) Health Care – employee contribution of \$50.00 per month effective as soon as possible, plus an additional \$50.00 effective July 1, 2014; and,
- D) Vacation Cash Out – a forty (40) hour cap effective through December 31, 2014, at which time it shall revert to the caps applicable on February 28, 2014.

DATED: February 2014

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Christopher D. Burdick, Esq.,  
S.B.N. 042732  
Impartial Chair

### CITY PANELIST COMMENTS

- 1) I agree with the majority of the Chair's recommendations and findings, but provide a limited dissent as follows. While the Chair assumes *arguendo* that decisions to participate in the Sweet Potato Festival and Camry Raffle were perhaps inopportune, the City believes it acted reasonably and appropriately to the extent it participated in these events. The City's financial challenges in this matter are largely associated with the continuing effects of the Great Recession, coupled with the City's personnel costs, and not with its *de minimis* participation in these two events.
- 2) The Chair's proposed temporary salary reduction is not sufficient and should be in a percentage amount equivalent to a 5% salary reduction starting retroactively to July 1, 2013. This would result in a salary decrease in a percentage higher than the proposed 7% deduction from March 1, 2014, and sun setting on December 31, 2014, in Section VIII of the Report. Additionally, if the decrease was instead to sunset on June 30, 2014, the percentage decrease would be substantially higher than the proposed 7%.

DATED: February , 2014



Danna Rasmussen  
City-Appointed Factfinder

## UNION PANELISTS' COMMENTS

I disagree with all of the Chair's findings and recommendations and so dissent from the Chair's Report, for the reasons set forth below:

The core argument from the Chair is that the City is in dire financial straits and that the employees should share in funding the City's programs by reducing their income. I do understand that it is not within the power of the Fact Finding Panel to give general direction to or instruct the City in how to run the City but it is the Panel's duty to make suggestions on how to fix the problem. These suggestion(s) should not only look at the short term issue that the City finds itself in but also take into account long-term fixes and consequences of the City's decision(s).

The Chair states that the City looks at how to best recover from a dire financial situation by taking equally from all employees and that the employee groups look only at what is best for them. This is an over-simplification. To believe that the City is looking at both the employee's best interest and the Council's and Manager's desires equally is assumptive and without basis of fact. To state that the employees only look at what is best for them and wish the City to look elsewhere for money to address the City's situation is overly broad and fails to take into account the particular group of people involved.

As the Chair accurately stated, the employee units have not had a substantive pay increase since 2008. Additionally the units had agreed not to take pay increases for the four years prior to that. This has been the City's course for many years, taking more consideration for the wanted expenditures of the City Manager and Council then for the employees who continue to this day to be underpaid when compared to like cities. When financial times were good, the City took from the employees, as it allowed inflation to devalue the pay the employees were receiving and now that times are not so good the City seeks to take even more from the employees instead of looking at ways to cut costs without taking from its employees.

The core purpose of government -- the federal and municipal government -- is to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare. If these words sound familiar, they should, as they are part of the Preamble to our United States Constitution. When the government is stripped of monies to do anything else,

it needs to provide for these things first and alone, as that is why taxpayers send their money to the government. The common defense, at the municipal government level, is police and fire, commonly called “public safety”. Justice and general welfare also fall under public safety, at least partly. When a city decides to spend its money on special events instead of these primary purposes, it fails to do its core job. The City’s 20 point “Duties of the City Council” do not even speak of festivals or similar events. As a Fact Finding Panel, we would be remiss if we did not address these practices which the City has stated it will continue in the future. We cannot tell the City not to manage in this fashion, but we can recognize it and make proper suggestions.

The Chair discussed two city funded festivals which the Union advanced as evidence that the City is not in the dire straits it claims. The Chair’s number of \$2400.00 is far below the true cost of these events. The City could not give a number as to how much it spent on the festivals or how much police overtime was paid out – most likely, the City has no idea. The true numbers are quite a bit higher -- The 4<sup>th</sup> of July Festival generated well over \$40,000 in costs to the City and the Sweet Potato Festival was over \$20,000. Interestingly, the expected savings from the City’s cuts to the Police Supervisor Unit is around the same amount spent on the Sweet Potato Festival, and the City’s actual expenditures on The 4<sup>th</sup> of July Festival almost matches the savings expected from the proposed cuts from the Union’s Officer’s unit. The City claims that the 4<sup>th</sup> of July Festival was funded outside of the City budget but was unable to identify which parts were and were not reimbursed to the City from this phantom fund. Nor was the City able to state how much money it did in fact spend on the Festival, which should be a simple accounting task. The City also claims it actually generated positive income from the two Festivals but was unable to state how much was made or the net cost after such income, again a simple accounting task.

The Livingston “financial crisis” has been a fact for many years and the City knew going into FY 2013-14 that it would be short monies to fund its obligations, well before it decided to spend monies it knew it did not have on these Festivals. For the Chair to reward the City for the practice of continued deficit spending would be akin to giving a child a crowbar because he was caught stealing cookies from the cookie jar, so he could later break into a store to steal from them. The City has refused to fix its financial situation even though it has the power to do so, engaging in deficit spending on the water system compared to the rates it charges its citizens while refusing to increase water rates even in these tough times. The City has one of the lowest

tax rates in the state but it refuses to increase taxes to generate income. Instead the City looks to take from those who offer their services, labor, and even their lives for the citizens. These citizens, in the end, are the ones who will pay the biggest price.

The LPD already has a hard time recruiting qualified candidates for police and dispatch. Police are expected to be morally and ethically straight and to make good decision in stressful times. Officers have the ability to take the freedoms and lives of citizens, including the family members of the council and of management. Does the Council truly not see that unqualified people in these positions pose a serious risk to the wellbeing of the citizens and themselves? With LPD's pay being one of the lowest in the County and State, one cannot expect that the best of society would wish to work in this City, which will soon attract only those unqualified to find such jobs in better paying cities. That would mean the worst of the best or the best of the worst, at best, would patrol Livingston and hold the lives of its citizens in their hands.

The members of the two Union labor units here in question are not "your normal employees". Most people in the midst of a fire would run from it (unless they were too busy filming it on their cell phones) and most people would run from gunshots. As we saw in the September 11<sup>th</sup> terrorist attack, public safety workers are not like "other people" – they run into fires to save others and run into gunfire to save children in a school with pipe bombs exploding around them. To say this group of people only looks out for what is best for them first goes against all evidence we know to be true. As discussed earlier, even in good financial times these LPD groups have allowed the City to use money that arguably should have been spent on public safety to be used instead for other City expenditures, like festivals, undocumented Council and Manager spending, and excessive use of attorneys and the court system with minimal likelihood of winning (such as over \$3,000,000 spent fighting Foster Farms over a \$100,000 water treatment plant). History has shown that LPD public safety groups are more than willing to take a personal loss, even up to giving their lives, for the better of society and it would be wrong to say the opposite. So too would we expect that these groups to stand firm against something they believe is morally and fundamentally wrong, even at the cost of their own wellbeing, monetarily or physically.

It is for these reasons that I write this dissent. A more appropriate finding would be for the City to maintain the FY 2012-13 status quo for FY 2103-14 and so leave pay at its current

rate. Though I disagree with the Chair's conclusion on the idea that workers should pay more for their health insurance (so that they will make more sound decisions), I do believe it would not be improper for the City to ask employees to pay a part of their health insurance, knowing too that the health insurance premium allocation was bargained for in the past as a quid pro quo of other benefits. The City's "vacation sell back" is an oddity and I believe it would be not unreasonable to adjust or eliminate that benefit as part of total package bargaining.

If the City asks the employees to help fund it's spending in tight financial times, then it should offer to increase the employees' pay at a time, in the future, when the financial situation is good, like many other cities, including the neighboring City of Atwater, have done. A clause in the MOU identifying a specific reserve level which would guarantee that employees are repaid the money they gave up and a percentage increase in pay at least equal to the cost of living/CPI change. Instead of reducing pay, a move with drastic future costs, the City should instead look hard at possible layoffs.

DATED: February 2014

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Sgt. Ray Fong  
Union-Appointed Factfinder, Supervisory Unit

On behalf of the Police Officers' Unit, I, too, dissent from the great majority of the Chair's Report and Recommendations, for all of the reasons set forth by Sgt. Fong, above. I understand the City's financial status as do the members of the LPOA. And while I can understand the Chair's take on "it is what it is" and what do we do to fix it now, I don't believe it to be as simple as that.

While we have pointed out spending that should have been curbed by the City or the obvious elephant in the room being the water rates, from the very beginning of negotiations nothing has been done by the City to change spending that is causing such financial turmoil. And from what can be seen even in the actions of the City in recent days, nothing is going to change.

We are looking at more festivals being paid for by the City and still no water rate increases or tax increases. This is all on the heels of layoffs a year and half ago where the City insisted that laying off four positions within the City (two of which came from the LPOA) that those cost savings would solve their financial problems. They didn't.

The City then comes to us and wants to cut pay from us and insists that if every group in City participates in such pay cuts or furloughs, again, this will solve their financial woes. There is still one unit that will not be participating in these cuts because they are still within their contract. So that being said, where will that put the City if they were in fact counting on every unit to participate?

During this process, an email was received from the City with advising the following:

"There's also a possibility of further impacts (cuts) associated with new fiscal year 2014-15 as we engage in new negotiations."

So if that is in fact the case and the City is still continuing to spend has they have in the past and as they are planning to in the future, i.e. a Kite Festival that was announced in the Merced Sun Star on 02/05/2014, then how can the City expect us to accept such demands? If the City was making every effort to truly cut costs, then I don't believe that any bargaining unit would have an issue with working with the City during these tough financial times. But what the City is really proposing is that its employees pay the City's debts while the City continues to rack up more debt. It's not unlike taking out a second or third mortgage on your home to pay off

your credit cards and then you acquire more debt on those same cards. That is most certainly the path to bankruptcy.

I consider the recommendations put forward by Mr. Burdick to be more reasonable than the City's proposal to impose on us anywhere from a 13%-15% reduction, not to mention the retroactive medical premiums as well, depending on the date in which they impose. I do not however agree with our unit paying twice the amount for medical starting July 1, 2014 and not ending December 31, 2014 after we will have paid an equal amount as the rest of the city employees. I don't believe it to be fair or right to have this unit continue to pay twice as much as the rest of the city employees permanently. The Chair sets forth no reason or rationale for this difference and distinction, one which I regard as unfair. If the intention is to "catch up" by this \$50 increase (from \$50 to \$100), the desired "catch-up" has more than been accomplished by the proposed salary reduction, which would run through December 31, 2014.

DATED: February , 2014

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Kristen Lucas  
Union Appointed Factfinder. Police Officers' Unit